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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 410

PACIFIC WESTBOUND CONFERENCE; AMERICAN HAWAIIAN STEAMSHIP COMPANY; AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; BANK LINE, LTD.; BLUE FUNNEL LINE—OCEAN STEAM SHIP CO., LTD., CHINA MUTUAL STEAM NAVIGATION CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAN"; CANADIAN PACIFIC STEAMSHIPS, LTD.; DE LA RAMA LINES—THE DE LA RAMA STEAMSHIP CO., INC., SWEDISH EAST ASIATIC CO., LTD.; EAST ASIATIC CO., LTD.; ELLERMAN & BUCKNALL STEAMSHIP CO., LTD.—AMERICAN & MANCHURIAN LINE; FERN LINE—FEARNLEY & EGER AND A. F. KLAVENESS & CO. A/S; ISTHMIAN STEAMSHIP COMPANY; IVARAN LINES—FAR EAST SERVICE; JAVA PACIFIC LINE—N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND", KONINKLIIKE ROTTERDAMASCHE LLOYD, N. V.; KLAVENESS LINE—A. F. KLAVENESS & CO., A/S; LANCASHIRE SHIPPING COMPANY LIMITED (CASTLE LINE); A. P. MOLLER-MAERSK LINE; PACIFIC FAR EAST LINE, INC.; PACIFIC ORIENT EXPRESS LINE—DITLEY-SIMONSEN LINES, TRANSATLANTIC STEAMSHIP CO., LTD.; PACIFIC TRANSPORT LINES, INC.; PRINCE LINE, LTD.; SALEN-SKAUGEN LINE—REDERI A.-B. PULP, REDERI A.-B. JAMAICA, D/S A/S EIKLAND, SALAMIS A/S; SILVER LINE, LTD.; STATES MARINE CORPORATION—STATES MARINE CORPORATION OF DELAWARE; STATES STEAMSHIP COMPANY; SUDDEN & CHRISTENSON, INC.; WESTERN CANADA STEAMSHIP COMPANY LTD.; WILH. WILHELMSEN,

Petitioners,

vs.

LEVAL & CO., INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of the State of Oregon	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	2
How the Federal Question is Presented	5
Reasons for Granting the Writ	5
Appendix A—	
Order of This Court Extending Time to File Petition for Writ of Certiorari	17
Order of Oregon Supreme Court Denying Petition for Rehearing	17
Judgment on Mandate of Oregon Supreme Court	18
Opinion of Oregon Supreme Court	22
Memorandum Opinion of Oregon Circuit Court	28
Appendix B—	
Statutes	38

Citations

Cases:

Boehm v. *Commission*, 326 U. S. 287 (1945)	10
California v. *United States*, 320 U. S. 577 (1944)	15
Cargo to Adriatic, Black Sea & Levant Ports, 2 U. S. M. C. 342 (1940)	14
Commissioner v. *Flowers*, 326 U. S. 465 (1946)	10
Contract Rates-North Atlantic Continental Freight Conference, Docket No. 724, 4 F. M. B. 98 (1952)	15
Contract Routing Restrictions, 2 U. S. M. C. 220 (1939)	15
Edmond Weil v. *Italian Line*, 1 U. S. M. C. 395 (1935)	14
Ex Parte 4, Section 15 Inquiry, 1 U. S. S. B. 121 (1927)	9

Page

Far East Conference v. *United States*, 342 U. S. 570 (1952) 11
General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422 (1940) 12
Hirschberg v. *Cooke*, 336 U. S. 210 (1949) 10
Isbrandsten Co. v. *United States*, 211 F. 2d 51 (1954), cert. den. 347 U. S. 990 ..... 6, 8
Pacific Coast-River Plate Brazil Rates, 2 U. S. M. C. 28 (1939) 14
Port Differential Investigation, 1 U. S. S. B. 61 (1925) 15
River Plate and Brazil Conferences v. *Pressed Steel Car Company, Inc.* (D.C. S.D.N.Y. decided September 17, 1954) 6
U. S. Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474 (1932) 11

Statutes:

Shipping Act, 1916, 39 Stat. 728, 46 U. S. C. Sections 801 *et seq.* 2, 16
Section 1 (46 U. S .C. Section 801) 6
Section 14 (46 U. S. C. Section 812, 813) 10
Section 15 (46 U. S. C. Section 814), 3, 5, 6, 8, 9, 10, 11, 15
Section 16 (46 U. S. C. Section 815) 10
Section 17 (46 U. S. C. Section 816) 10
Section 22 (46 U. S. C. Section 821) 10
Section 23 (46 U. S. C. Section 822) 10
Section 24 (46 U. S. C. Section 823) 10
Section 25 (46 U. S. C. Section 824) 14

Miscellaneous:

Senate Report No. 44, 80th Congress accompanying S. 110 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

PACIFIC WESTBOUND CONFERENCE; ET AL.,
Petitioners,

vs.

LEVAL & CO., INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioners Pacific Westbound Conference and its twenty-nine member steamship lines respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above entitled case on April 21, 1954.

Opinions Below

The memorandum opinion of the circuit court of the State of Oregon for Multnomah County is unreported, and is printed in Appendix A hereto, *infra* p. 28. The opinion of the Supreme Court of Oregon, printed in Appendix A

hereto, *infra*, p. 22, is reported in 269 P. 2d 541 and in 58 Ore. Advance Sheets 667.

Jurisdiction

The judgment on mandate of the Supreme Court of Oregon was entered on April 21, 1954 (R. vol. I p. 211, *infra*, p. 18). Rehearing was denied on May 19, 1954, (R. vol. II p. 53, *infra*, p. 17). On August 10, 1954, this Court ordered that the time for filing petition for Writ of Certiorari be extended to and including October 16, 1954 (*infra*, p. 17).

Question Presented

Whether Section 15 of the Shipping Act, 1916 requires the Federal Maritime Board to give prior separate approval to the use of contract/non-contract rates by common carriers in foreign trade whose conference agreements, theretofore approved by the Board, provide for and contemplate the collective fixing of lawful rates.

Statutes Involved

The statutory provisions involved are Sections 14-17, inclusive, and 22-25 inclusive, Shipping Act, 1916 as amended (39 Stat. 733 *et seq.*; 46 U. S. C. Sections 812-816 inclusive, and 821-824 inclusive). They are printed in Appendix B hereto, *infra*, p. 38.

Statement of the Case

Pacific Westbound Conference [1] is a voluntary association of steamship company common carriers by water engaged in foreign commerce from ports on the Pacific Coast to ports in the Far East (R. vol. I, p. 207-208). The Conference was duly organized under the authority of the Shipping Act, 1916 (46 U. S. C. Section 801 *et seq.*) and is subject

[1] Pacific Westbound Conference is hereinafter referred to as "the Conference.

to the jurisdiction of the Federal Maritime Board.[2] On June 26, 1923, pursuant to Section 15 of the Shipping Act (46 U. S. C. Section 814), the Board approved a basic agreement filed by the Conference, providing for regulation of traffic matters of its member lines, including the collective fixing of lawful rates and the filing with the Board, *inter alia*, of conference rates and tariffs. The form of contract rate agreements with shippers is also required to be filed with the Board, by rules and regulations provided for in the basic conference agreement. Under this agreement as amended, the Conference has since that time operated continuously.

Respondent is a shipper of merchandise and other cargoes which has long used the water transportation facilities of petitioner carriers for its west-bound shipments, pursuant to a contract rate agreement in the form filed with the Board, entered into between respondent and petitioners in 1946, and thereafter amended by mutual agreement (R. vol. I p. 208). Such form of contract is still in effect between the parties as well as between petitioners and many other shippers situated similarly to respondent.

Under the terms of the contract respondent agreed to offer for shipment on vessels of petitioner conference carriers, all respondent's west-bound trans-Pacific shipments of certain commodities including flour, and not to ship such commodities by vessels of non-conference carriers except upon receipt of notice that no space was available on conference member line vessels (R. vol. I, p. 9). Petitioner agreed to carry all such shipments within limits of the capacities of its vessels, at specified reduced tariff rates, lower than the conference rates for such commodities to shippers not signatory to the contract. For breach of the contract respondent agreed to pay liquidated damages in

[2] The Federal Maritime Board and its predecessors are hereinafter referred to as "the Board".

lieu of actual damages, because of the impossibility or impracticability of determining petitioners' actual damages. (R. vol. I p. 9).

From the time the contract became effective until suit was filed respondent regularly shipped commodities including flour over the lines of petitioner carriers in accordance with the terms of the contract. On September 29, 1949, in violation of the agreement, respondent shipped 250 tons of flour from Astoria, Oregon to Manila, Philippine Islands aboard a non-conference foreign flag vessel, without having first offered the flour for shipment aboard vessels of conference carriers. (R. vol. I, pp. 68, 69).

Petitioners brought suit in the Oregon circuit court to recover damages sustained in consequence of the breach. In defense respondent urged that the contract was in violation of the Shipping Act, Sections 15 and 16, and that the liquidated damage clause constituted a penalty provision rendering the contract unenforceable.

The trial court found there had been a material breach of the contract but denied petitioners a recovery on both grounds. Thereafter the Court permitted the cause to be re-opened to determine the actual amount of damages but again denied recovery. Petitioners appealed from the adverse judgment and respondent cross-appealed, claiming that it was error for the trial court to permit the case to be re-opened for proof of actual damages.

The Supreme Court of Oregon on appeal affirmed the judgment of the trial court, on the sole ground that the contract provision for a reduced rate to shippers exclusively using vessels of conference carriers was unenforceable until the practice of using contract/non-contract rates was separately approved by the Board pursuant to Section 15 of the Shipping Act, even though the basic conference agreement governing activities of the conference had previously been approved by the Board.

How the Federal Question Is Presented

The state court of last resort relied solely upon federal grounds for its decision. The question sought to be reviewed was the only question decided by the Oregon Supreme Court in affirming a judgment of the trial court that without specific Board approval, contract/non-contract rates are in violation of the Shipping Act. Respondent first raised the issue by way of answer in the trial court (R. vol. 1 p. 52); it was made one basis of the trial court judgment (R. vol. I pp. 209, 210); and thereafter was relied upon by petitioners in their Bill of Exceptions (R. vol. II p. 10). The opinion of the Supreme Court of Oregon is devoted to a consideration of this single question (*infra*, p. 22). The Court said in 269 P. 2d 541 at p. 542, "The serious question that confronts this court is whether or not it is necessary that the conference agreement and its amendments as entered into between the steamship companies in order to give validity to the contract of carriage as sued upon must set forth the proposed dual contract rate program and be approved by the United States Maritime Commission. . . ."

Reasons for Granting the Writ

The Decision of the Supreme Court of the State of Oregon:

A. *Is of Such Immediate and Widespread Importance in the Foreign Commerce of the United States and*

B. *Its Impact Upon Effective Administration of the Shipping Act Will Have Such Vital Repercussions Throughout the Shipping Industry,*

as to Require its Review by This Court.

The decision of the Supreme Court of Oregon is in diametric opposition to a well-established and long-standing construction given to Section 15 of the Shipping Act, 1916

by the Board. It will result in serious hindrance to effective administration of the Act, and will require the Board to make impracticable changes in regulatory procedures adopted and adequately administered by it for the past twenty-seven years. It will have a direct, immediate and profound impact upon common carriers, shippers and consignees in the foreign commerce of the United States, upon ocean transportation and the shipping industry in general throughout the world. Resolution of the question presented will thus have immediate importance far beyond the particular facts and parties involved.

The issue is both novel and troublesome. The decision of the court below was based upon *Isbrandsten Co.* v. *United States,* 211 F. 2d 51 (cert. den. 347 U. S. 990 [3]), and in turn was followed on substantially similar facts by the decision on September 17, 1954 in *River Plate and Brazil Conferences* v. *Pressed Steel Car Company, Inc.* (D. C. S. D. N. Y., Civ. 88-211, petition for rehearing to be filed).[4]

Section 15 of the Shipping Act, 1916, on which the opin-

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[3] The question of finality of a Board order was also sought to be reviewed on petition for certiorari. Petitioner Pacific Westbound Conference filed a motion for leave to file a brief amicus curiae with this Court in support of the petition for certiorari, which motion was denied.

[4] The contract between petitioners and respondent is not itself required to be approved by Section 15, although the necessity of such approval is incorrectly suggested in the opinion of the court below (269 P. 2d at p. 542). Section 15 is applicable on its terms only to agreements between carriers or between a carrier and "other person subject to this Act". The Section of the Act defining terms (46 U.S.C. Sec. 801) does not include "shippers" within the meaning of "other person subject to this Act", but restricts application of the term to: "Any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water".

ion of the Oregon Supreme Court was based, reads as follows:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.
>
> Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.
>
> All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to

carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monoplies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Without reference to the contrary construction placed upon this Section by the governmental agency primarily charged with responsibility for administering it, the court below held that reduced rates to shippers using conference vessels exclusively, constituted "agreements" within the meaning of Section 15. The United States Court of Appeals for the District of Columbia Circuit, in *Isbrandsten Co.* v. *United States*, 211 F. 2d 51, the single judicial authority cited by the Oregon Supreme Court, with no mention of the highly complicated and technical problems of ocean transportation and the competitive conditions faced by the American Merchant Marine vis-a-vis foreign carriers and shipping interests, referred to the interpretation given by the Board as "inconsistent with the clear language of Section 15" (211 F. 2d 51 at p. 56).

The clear language of the Section, taking its words in their literal meaning, requires approval by the Board of every routine conference activity including day to day rate changes however minor in nature.

There are in existence today approximately one hundred and five freight conferences operating in ocean commerce on every important foreign trade route of the United States. Together these conferences account for many thousands of rates, rate changes and conference rules adopted every year. Each such rate or rate change constitutes an "agreement" among member carriers of the conference. To require the Board to give separate approval to each such rate change would be to place an intolerable administrative burden upon the Board, as well as to subject both carrier and shipper to delay and inconvenience. It would have been impracticable and contrary to the legislative intent for the Board to have adopted a scheme of administrative approval of each rate filed and each action taken by the conferences in operating from day to day under their basic agreements.

Accordingly, the long existing interpretation of Section 15 by the Board has been that basic conference agreements must be approved before they become effective. Until approved by the Board such agreements are unlawful.

But in order to define the scope, within workable administrative limits, of "every agreement" as used in Section 15, the Board in 1927 conducted a formal rule making proceeding (*Ex Parte 4, Section 15 Inquiry,* 1 U. S. S. B. 121, 124-125) participated in by one hundred and ninety-two carriers. It concluded that the only "conference agreements within the purview of Section 15 are those whereby the carriers propose to be governed in their conference activities . . ." and that to include "routine operations relating to current rate changes and other day-to-day transactions" would be to place too literal an interpretation upon the word "every".

Thus basic conference agreements were determined to require prior approval of the Board, but additional approval was not required for particular rates, tariffs and charges adopted pursuant to such agreements.

So under Section 5a (2) of the Interstate Commerce Act (49 U. S. C. 5b) and Section 4b of the Civil Aeronautics Act (49 U. S. C. 492-494) both of which were modeled on Section 15 of the Shipping Act, specific rates are not approved. Only the basic enabling agreement authorizing the use of such rates requires approval (Senate Report No. 44, 80th Congress accompanying S. 110, pp. 13-14).

A statutory construction followed for so long a time by the administrative agency charged with the administration of the Shipping Act is entitled to great weight. See *Hirschberg* v. *Cooke,* 336 U. S. 210 (1949); *Commissioner* v. *Flowers,* 326 U. S. 465, 469 (1946); *Boehm* v. *Commission,* 326 U. S. 287, 292 (1945).

This construction of Section 15 has been the fixed administrative practice of the Board consistently followed since that time. Once the basic conference agreement has been approved, the subsequent fixing of thousands of rates and tariff regulations adopted by the conferences are not subject to separate inquiry under Section 15, and no approval has been given to such agreements.

This is not to say the legality of these tariffs, rate changes and rules is established for all purposes by approval of the conference agreement. The rates themselves must independently withstand the tests prescribed by Sections 14, 15, 16 and 17 of the Shipping Act, that they be neither unfair, unjustly discriminatory nor detrimental to the commerce of the United States. If a conference were to establish a rate in violation of these safeguards, any person upon complaint, or the Board on its own motion could attack the lawfulness of the rate, and under Section 22, the Board after investigation is empowered to award reparations to complainants injured by violations of the Act.

The relative stability of rate structures and frequency of service relied upon by shippers, and enabling United

States flag common carriers by water to compete for cargo on a reasonably equal basis with foreign flag lines has been replaced, due to inconsistent interpretations of Section 15 by court and board, by confusion and unsettled conditions throughout the shipping industry. Disastrous rate wars have resulted, with important adverse effects upon shippers and upon every member line of many conferences. The conflict between the Board's interpretation of Section 15, and the interpretation placed upon the statute by the court below, must be resolved by a ruling of this Court before the stability of rate structures in foreign commerce—a primary object of the regulatory statute—can be regained.

In a sense, the question sought to be reviewed is one of characterization. On the one hand, a literal reading of Section 15 requires the Board to approve "every" agreement between common carriers by water. On the other hand, it is administratively impracticable for the Board to approve each single routine rate change or tariff. The Board in its practice has characterized contract/non-contract rates as the latter type of activity, not requiring Section 15 approval. Such an interpretation of a statute by the agency primarily charged with responsibility for its administration is in effect an exercise of discretion, in the Board's own unique and complex field of international water transportation.

The functions of the Board under the doctrine of exclusive primary jurisdiction have more than once been delineated by this Court. *Far East Conference* v. *United States*, 342 U. S. 570, 573-574 (1952); *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485 (1932).

> "The [Shipping] Act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high

degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *United States* v. *Hamburgh-American S. S. Line,* 216 Fed. 971.

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws. Compare *Keogh* v. *Chicago & N. W. Ry. Co.,* supra [260 U. S. 156], at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion."

In *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422 (1940), this principle was applied under the Interstate Commerce Act to facts similar to those in the case at bar. This Court said:

"We hold the District Court had jurisdiction, but that, based upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect

to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act" (p. 428).

". . . the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission . . . there is submitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful order" (p. 432).

Petitioner Pacific Westbound Conference, since its organization and the formal Board approval of its basic conference agreement in 1923, has continued to inform the Board of its actions under that approved agreement by submitting through the Board's Regulatory Staff pursuant to staff request, copies of its minutes, all its rates, rate changes, rules adopted and forms of agreements with its shippers. The changes in rates submitted by petitioner conference have been many and continuous. The Board has reviewed this data and from time to time, through its staff, has required the conference to change provisions of its contracts with shippers and provisions of its tariff regulations.

Petitioners have operated under these contract/non-contract rate tariffs for many years. They are advised that approximately sixty other shipping conferences are similarly operating under such tariffs without specific prior approval by the Board of such rates, or of any of the multitude of changes of such rates which occur regularly in the operation of the conference under its Board approved basic agreement.

If the decision in the court below were correct it would mean that this conference has been acting unlawfully and that commodity freight rate contracts presently in effect and entered into by it with over 2000 of its shippers, are unenforceable. But of far greater significance, the decision would mean also that petitioner and all other conferences in

foreign trade similarly situated will be forced to accept an impracticable procedure for obtaining separate rate approvals which will constitute a serious obstacle to carrying on their functions. It is essential that steamship conferences institute rates and rate changes promptly to meet competitive and economic changes in their trades. Rate making is a continuous process. The delay incident to a procedure for formal approval of rates by the Board administering the Shipping Act would seriously injure the conferences by reducing their effectiveness in promoting stability of rates and would hinder the Board in the exercise of its regulatory functions. Formal prior separate approval of rates is not a necessary procedure for protection of persons demonstrably injured by rates unduly discriminatory or detrimental to commerce, since the complaint procedures and reparation provisions of the Act constitute ample safeguards against such abuses.

The Board does not have general powers to fix or to approve in advance an entire structure of ocean freight rates of carriers engaged in foreign commerce. It does, however, have the power to condemn specific rate practices of conference lines which are unfair, unjustly discriminatory or detrimental to the commerce of the United States. *Edmond Weil* v. *Italian Line,* 1 U. S. M. C. 395 (1935); *Pacific Coast-River Plate Brazil Rates,* 2 U. S. M. C. 28 (1939); *Cargo to Adriatic, Black Sea & Levant Ports,* 2 U. S. M. C. 342 (1940).

In addition, under Section 25 (46 U. S. C. Section 824) the Board is empowered to modify or cancel the basic conference agreement in a case where conference action, such as the use of reduced rates to shippers using conference carrier vessels exclusively, is found to be unjustly discriminatory or otherwise violative of the Shipping Act. Thus in the exercise of its plenary power over carriers acting together pursuant to a Section 15 agreement, the Board has disapproved and canceled agreements found to operate

unfairly as between carriers (*Port Differential Investigation*, 1 U. S. S. B. 61 (1925)), and has required a conference to desist from initiating contract/non-contract rates, under penalty of cancellation of the basic conference agreement. *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939); *Contract Rates-North Atlantic Continental Freight Conference*, Docket No. 724, 4 F. M. B. 98 (1952).

The broad authority conferred by the Shipping Act upon the Board over carriers acting together under conference agreements carries with it the authority to establish procedures and to formulate rules designed to aid it in administering effectively the regulatory program contemplated by the statute. As this Court said in *California* v. *United States*, 320 U. S. 577 (1944), "Finding a wrong which it is duty bound to remedy, the Maritime Commission [Board], as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the framework of the Shipping Act, fashion tools for so doing" (p. 584).

If the decision below were correct it would mean that all of the carrier members of the large number of conferences of lines operating regular or berth services from United States ports to all ports of the world, and presently employing contract/non-contract rates, have been and are acting illegally. This would result in such carriers being faced with the possibility of a multitude of suits for damages and reparations and to actions for penalties under Section 15, despite their longstanding adherence to established practice and compliance with requests and administrative guidance received from the Board respecting such rates.

Finally, if specific Board approval is to be required for every rate change proposed by a conference, the function of conference rate-making so far as American flag carriers are concerned must be abandoned to the detriment of shippers and carriers alike. Even if the Board were substantially

to increase its staff and streamline its procedures, it could not hope to pass upon the thousands of rate proposals it receives each month without crippling delays. It is submitted that nothing in the legislative history or in the language of the Shipping Act contemplated such obstacles to conference rate-making.

Conclusion

For all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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OCTOBER 16, 1954.

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1954

Pacific Westbound Conference, American-Hawaiian Steamship Company, etc., et al., *Petitioners,*

vs.

Leval & Co., Inc., a New York Corporation

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 16th, 1954.

(S.) Tom C. Clark,
Associate Justice of the
Supreme Court of the
United States.

Dated this 10th day of August, 1954.

Order Denying Petition for Rehearing

Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 1st day of March, 1954.

Whereupon on this Wednesday the 19th day of May, 1954, the same being the 19th judicial day of said term, there were present:

Earl C. Latourette, Chief Justice,
Harold J. Warner, Acting Chief Justice,
George Rossman, Associate Justice,
Hall S. Lusk, Associate Justice,
James T. Brand, Associate Justice,
Walter L. Tooze, Associate Justice,

William C. Perry, Associate Justice,
F. M. Sercombe, Clerk

when the following proceedings were had:

PACIFIC WESTBOUND CONFERENCE, ET AL., *Appellants,*

v.

LEVAL & CO., INC., A CORPORATION, *Respondent.*

Appeal from MULTNOMAH COUNTY

The court having duly considered appellants-cross-respondents' petition for rehearing in the above-entitled cause, and now being fully advised in the matter,

It is hereby ordered that said petition be denied.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. 192-485

PACIFIC WESTBOUND CONFERENCE, ET AL., *Plaintiffs,*

vs.

LEVAL & CO., INC., A NEW YORK CORPORATION, *Defendant.*

JUDGMENT ON MANDATE OF SUPREME COURT

Be it remembered that this matter came on regularly for hearing on the application of James P. Cronan, Jr., one of the attorneys for Leval & Co., Inc., the defendant, for an order for the entry in the proper records of this Court of the State of Oregon regularly made therein upon the appeal of the above-entitled cause from this Court and for the entry of a judgment in accordance with the terms of the mandate; and it appearing to this Court that the Supreme Court of the State of Oregon did heretofore and on the 21st day of April, 1954, duly and regularly make and enter a certain mandate on the judgment in the appeal of the above entitled cause wherein Pacific Westbound Conference, et al., were appellants, and Leval & Co., Inc., was respondent,

which mandate and judgment as appears from the copy thereof duly certified by F. M. Sercombe, Clerk of the Supreme Court of the State of Oregon, on the 20th day of May, 1954, was and is in words and figures as follows:

Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 1st day of March, 1954,
Whereupon on this Wednesday the 21st day of April, 1954, the same being the 13th judicial day of said term, there were present:

Earl C. Latourette, Chief Justice,
Harold J. Warner, Acting Chief Justice,
George Rossman, Associate Justice,
Hall S. Lusk, Associate Justice,
James T. Brand, Associate Justice,
Walter L. Tooze, Associate Justice,
William C. Perry, Associate Justice,
F. M. Sercombe, Clerk.

when the following proceedings were had:

No. 192485

PACIFIC WESTBOUND CONFERENCE, ET AL., *Appellants,*

v.

LEVAL & CO., A CORPORATION, *Respondent.*

Appeal from MULTNOMAH COUNTY

This cause on March 17, 1954, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

It is therefore considered, ordered and adjudged that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

The appellants having given an undertaking on appeal

with the Aetna Casualty and Surety Company as their surety, conditioned that appellants will pay all damages, costs and disbursements awarded against them on appeal; it is therefore ordered that respondent have and recover of and from appellants and their said surety its costs and disbursements in this court taxed at $222.00.

It is further ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter a judgment in accordance herewith.

STATE OF OREGON,
County of Marion, ss.

I, F. M. SERCOMBE, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of JUDGMENT has been by me compared with the original journal entry and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Salem, Oregon, May 20, 1954.

[SEAL]

(S.) F. M. SERCOMBE,
Clerk of Supreme Court,
State of Oregon.

To the Circuit Court of the State of Oregon, for the County of Multnomah:

You are hereby commanded that of the above judgment order of our Supreme Court you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Supreme Court, and to law and justice shall appertain.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, May 20, 1954.

[SEAL]

(S.) F. M. SERCOMBE,
Clerk of Supreme Court,
State of Oregon.

Now, therefore, it is hereby

Ordered that said mandate and judgment heretofore made and entered by the Supreme Court of the State of Oregon upon the appeal to that Court from this Court of the above-entitled cause, be, and the same hereby is, duly entered in the proper journals and records of this Court; it is further

Ordered and adjudged that the plaintiffs, Pacific Westbound Conference, et al., take nothing and that the defendant, Leval & Co., Inc., do have and recover of and from the plaintiffs and their surety, the Aetna Casualty and Surety Company the sum of $24.00 with interest thereon at the rate of 6% per annum from the 4th day of August, 1952, until paid, and the sum of $222.00 with interest thereon at the rate of 6% per annum from the 21st day of April, 1954, until paid, and that execution issue therefor.

Done and dated at Portland, Oregon, this 30th day of June, 1954.

(S.) MARTIN W. HAWKINS,
Circuit Judge.

Approved:

(S.) ALBERT E. STEPHAN,
Of Attorneys for Plaintiffs.

(S.) JAMES P. CRONAN, JR.,
Of Attorneys for Defendant.

Filed Apr. 21, 1954. F. M. Sercombe, Clerk (Supreme Court of Oregon) by —— ——, Deputy.

IN THE SUPREME COURT OF THE STATE OF OREGON

PACIFIC WESTBOUND CONFERENCE; AMERICAN HAWAIIAN STEAMSHIP COMPANY; AMERICAN MAIL LINE LTD.; AMERICAN PRESIDENT LINES, LTD.; BANK LINE, LTD.; BLUE FUNNEL LINE—OCEAN STEAM SHIP CO., LTD., CHINA MUTUAL STEAM NAVIGATION CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAN"; CANADIAN PACIFIC STEAMSHIPS, LTD.; DE LA RAMA LINES—THE DE LA RAMA STEAMSHIP CO., INC., SWEDISH EAST ASIATIC CO., LTD.; EAST ASIATIC CO., LTD.; ELLERMAN & BUCKNALL STEAMSHIP CO., LTD.—AMERICAN & MANCHURIAN LINE; FERN LINE—FEARNLEY & EGER and A. F. KLAVENESS & CO. A/S; ISTHMIAN STEAMSHIP COMPANY; IVARAN LINES—FAR EAST SERVICE; JAVA PACIFIC LINE—N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND", KONINKLIJKE ROTTERDAMASCHE LLOYD, N. V.; KLAVENESS LINE—A. F. KLAVENESS & CO., A/S; LANCASHIRE SHIPPING COMPANY LIMITED (CASTLE LINE); A. P. MOLLER-MAERSK LINE; PACIFIC FAR EAST LINE, INC.; PACIFIC ORIENT EXPRESS LINE—DITLEY-SIMONSEN LINES, TRANSATLANTIC STEAMSHIP CO., LTD.; PACIFIC TRANSPORT LINES, INC.; PRINCE LINE, LTD.; SALEN-SKAUGEN LINE—REDERI A.-B. PULP, REDERI A.-B. JAMAICA, D/S A/S EIKLAND, SALAMIS A/S; SILVER LINE, LTD.; STATES MARINE CORPORATION—STATES MARINE CORPORATION OF DELAWARE; STATES STEAMSHIP COMPANY; SUDDEN & CHRISTENSON, INC.; WESTERN CANADA STEAMSHIP COMPANY LTD.; WILH. WILHELMSEN;

Appellants,

vs.

LEVAL & CO., INC., a New York Corporation,

Respondent and Cross-Appellant.

Appeal from Circuit Court, Multnomah County

Martin W. Hawkins, Judge

Argued and Submitted March 17, 1954

Albert E. Stephan, of Seattle, Washington, argued the cause for appellants. With him on the briefs was Allan Hart, of Portland.

James P. Cronan, Jr., of Portland, argued the cause for respondent and cross-appellant. With him on the briefs were Donald A. Schafer and Schafer, Holbrook & Cronan, of Portland.

Before Latourette, Chief Justice, and Warner, Possman, Lusk, Brand and Perry, Justices.

PERRY, J.

Affirmed.

PERRY, J.:

The plaintiffs are a voluntary association of numerous common carrier steamship companies duly organized under the authority of Title 46, USCA, cited as the "Shipping Act of 1916", and operating under the name of Pacific Westbound Conference. The members of the association operate ships in regular service, carrying cargo west-bound from ports on the Pacific coast of the United States and Canada to ports in the far East.

The defendant, a corporation with its principal office in New York City, New York, maintaining a branch office in Portland, Oregon, is an extensive shipper of merchandise and other commodities by steamship.

In October, 1946, the plaintiffs entered into a contract with the defendant (the contract being designated as "Pacific Westbound Conference General Commodity Contract Rate Agreement") which provided that the defendant would consign all of its cargo shipments from Pacific coast ports via ships of carriers belonging to the Pacific Westbound Conference, and in consideration of the exclusive use of Conference ships, the defendant was to receive a lower tariff rate than that of a shipper who did not enter into such an exclusive contract of carriage. This exclusive contract of carriage, however, was not limited solely to the defendant, but was open to anyone who desired to enter into such an agreement.

The contract between the plaintiffs and the defendant also provided that should the defendant ship cargo with a carrier who was not a member of the Conference, then the shipper had breached the contract and would be liable in damages in a sum equal to the contract tariff of the shipment, this amount being agreed to as liquidated damages in

lieu of actual damages because of the impossibility or impracticability of determining the actual damage suffered by the plaintiffs.

The original contract as entered into was from time to time amended as to rates and terms by mutual agreement of the parties, the last revision and acceptance being on May 15, 1949.

In September, 1949, the defendant in violation of the contract agreement made a shipment from Astoria using a foreign flag vessel which was not a member of the Conference, and this action was brought by the plaintiffs for damages suffered by breach of the contract. The matter was tried to the circuit court without a jury, the trial court finding that there had been a breach of the contract, but denying the plaintiffs a recovery. Subsequent to a determination by the trial court that the plaintiffs could not recover liquidated damages as provided in the contract, the court permitted the cause to be reopened and the court determined the actual amount of damages, but still denied recovery. The plaintiffs have appealed from the adverse judgment of the court, and the defendant has cross-appealed, claiming that the trial court was in error in permitting the plaintiffs to reopen the case for the purpose of proving their actual damages.

The serious question that confronts this court is whether or not it is necessary that the conference agreement and its amendments as entered into between the steamship companies in order to give validity to the contract of carriage as sued upon must set forth the proposed dual contract rate program and be approved by the United States Maritime Commission prior to the execution of the General Commodity Contract Rate Agreement, or, in lieu thereof, that the General Commodity Contract Rate Agreement between these parties be first formally approved by the United States Maritime Commission.

The answer to this question must be determined from the construction of Title 46, USCA, and particularly § 814 thereof, which reads as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the

commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

"The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

"All agreements, modifications, or cancellations, made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

The memorandum of agreement which bound the various carriers together into the Pacific Westbound Conference was made and entered into on the 8th day of January, 1923, and duly approved by the Maritime Board (now existing as the United States Maritime Commission) on June 26, 1923. This agreement has from time to time been amended by the members of the Conference and the amendments duly approved by the United States Maritime Commission. The members of the Westbound Conference provide by their contract that their association together "is for the regulation of traffic and not of operation and only covers rates, tariffs, brokerage and matters directly relating thereto", and the parties to the Conference "agree and stipulate with each other that they will be bound by the agreement of two-thirds of their number * * * as to any tariff, freight rate, charge, brokerage, traffic regulation and/or, any other matter within the scope of this agreement with the same force and effect as if expressly made a part hereof." It is, therefore, readily seen that the action of two-thirds of the members of the Conference in determining tariff rates and approving lower rates to exclusive users of Conference lines effects a change or modification in the agreement of the parties binding upon all members of the Conference.

Section 814 of Title 46, USCA, hereinbefore set out, provides that the term "agreement" as used in the act includes "understandings" and "other arrangements", and that all agreements, modifications or cancellations made subsequent to the organization of the Commission under the act *shall be lawful only when approved by the Commission and that it shall be unlawful, directly or indirectly, to carry out any agreement or understanding or practice until approved.*

Thus an agreement of dual rates as set forth in the contract sued upon is subject to the control of the United States Maritime Commission. The reason for this is readily understandable because the shipping act of 1916 permits the combining of a group of carriers and action by them that

would be unlawful under §§ 1-11 and 15 of Title 15, UCLA, and the amendments and acts supplementary thereto, generally referred to as the Sherman Antitrust Act and the Clayton Act, and while, because of necessity in connection with the maintenance of adequate sea transportation for this country, Congress felt that the steamship companies could combine and operate to some extent in restraint of trade and carry on a monopolistic practice, for the protection of the public interest this was to be permitted only under due and proper supervision. The shipping act provides for prior approval.

We are impressed with the reasoning of the United States Court of Appeals for the District of Columbia Circuit in the case of Isbrandtsen Company, Inc., v. United States of America and Federal Maritime Board, et al., — F2d —, (decided January 21, 1954), wherein it is stated:

> "* * * This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se."

The Conference agreement and its amendments and changes as approved by the Maritime Commission does not provide for a reduced rate to shippers exclusively using ships of the Pacific Westbound Conference, and it is admitted that the contract of the parties litigant although filed was never approved. We are of the opinion that there must first be formal approval of this practice as to this particular Conference by the United States Maritime Commission before such an agreement is enforceable between the Conference and a shipper.

The pleadings and the evidence failing to show the neces-

sary approval by the United States Maritime Commission, the circuit court was correct in its result.

Since we view the contract as being "unlawful" and, therefore, unenforceable before approval by the United States Maritime Commission, it is unnecessary to consider the other issues of error claimed by the parties.

The judgment of the trial court is affirmed.

IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

No. 192-485

PACIFIC WESTBOUND CONFERENCE, AMERICAN-HAWAIIAN STEAMSHIP COMPANY, ET AL.,
Plaintiffs,

vs.

LEVAL & CO., INC., a New York Corporation,
Defendant.

MEMO OPINION

In this case plaintiffs bring action for damages against defendant for alleged violation of a shipping contract entered into between plaintiffs and defendant on October 12, 1946. Plaintiff Pacific Westbound Conference is a voluntary association of common carrier steamship companies. The other plaintiffs are steamship companies engaged in the operation of ships in regular service carrying cargoes from ports in the United States to ports in the Far East, and these were members of Pacific Westbound Conference.

On or about October 12, 1946 the defendant entered into a contract with the plaintiffs by which the defendant agreed to utilize and to ship certain contract commodities from the Pacific Coast to the Orient and to use only the shipping facilities afforded by the plaintiffs, except as the contract otherwise provided; said contract was mutually revised,

the last revision agreed upon being dated May 2, 1949. Plaintiffs charge the defendant with violation of the contract by evasion and subterfuge, in that defendant arranged for and made a shipment of 250 tons of flour from Astoria, Oregon, to a point in the Far East to which plaintiffs' carriers furnish water transportation under the said contract; that this shipment was made aboard the SS CYCLOPE, a foreign flag vessel not a member of Pacific Westbound Conference; that defendant did not first offer said shipment of flour to vessels owned by the plaintiff carriers. The complaint further alleges that the defendant failed to furnish, upon request, full and complete information with respect to the shipment so made.

The contract provides that in the event of any shipment or shipments being made in violation of the provisions of the contract, the shipper shall pay liquidated damages to the carriers in lieu of actual damages which would be difficult or impracticable to determine, "in the amount of freight which the shipper would have paid had such shipment moved via a Conference carrier." Plaintiffs allege this sum to be $5500.00, or at the rate of $22.00 per ton. During the trial it developed that the contract rate at the time of the alleged breach was $18.00 per ton and that the freight charge as of the time of the breach would amount to $4500.00, instead of the $5500.00 demanded in plaintiffs' complaint.

To this complaint the defendant has filed an amended answer containing a plea in abatement. The answer consists of denials which put in issue all claims of violation of the contract and also sets up and alleges, in separate answers and defenses, that the contract upon which the action is brought is illegal for the reasons set forth therein. The Court heard the plea in abatement prior to the time that the case was heard on the merits and came to the conclu-

sion that the matters set up in the plea in abatement were matters pertaining to the merits of the controversy and should be urged in the hearing on the merits of the cause, and the plea in abatement was overruled.

The evidence in the case disclosed that Louis Dreyfus & Co. (Overseas), Ltd., Manila, a subsidiary of Leval & Co., Inc., the defendant, placed an order for a quantity of Canadian flour (675 tons) with the Vancouver office of Leval & Co. and advised shipment on the vessel CYCLOPE. Leval & Co., Vancouver, was unable to obtain all the flour in Canada and needed 250 tons from the United States and requested the local office to purchase 250 tons and have the same loaded on the CYCLOPE for shipment to Manila to Dreyfus & Co. Dreyfus & Co. sold all of this flour to various grocers and stores in Manila, except for a small quantity.

The evidence further showed that some question arose in the mind of Mr. Timmins, the Manager of the Portland office of defendant, as to the propriety of this shipment, and after a conference with the Vancouver office, the 250 tons were old to Hallet & Carey, of Canada, a non-contract shipper. However, the evidence in the case indicates to the Court that this transaction between Leval & Co. and Hallet & Carey was merely a paper transaction and was entered into for the purpose of permitting the shipment to be made in the name of another apparent owner in order to avoid conflict with the provisions of the contract. In fact, Mr. Timmins when on the stand testified that he wrote certain letters that were in the nature of fabrications and were intended to "cover up the transaction." In any event, Hallet & Carey never had possession of the flour and the transaction finally would up so that Hallet & Carey received the sum of $100.00 profit out of the transaction for their appearance in the transaction as purchasers. The

Court has come to the conclusion that this was a violation of the provisions of the contract contained in Art 3, which prohibits the shipping with a non-Conference shipper by "evasion or subterfuge, either directly or indirectly, by any means."

The defendant claims that the amount sought to be recovered constitutes a penalty, and not liquidated damages, and is therefore not enforcible. The parties are generally agreed that the law will not permit a penalty to be exacted for failure to comply with the terms of a contract, even though the contract uses the term "liquidated damages," and if the so-called liquidated damages do, in fact, amount to a penalty, the Court will not allow the amount agreed upon between the parties as liquidated damages.

The Oregon law holds to the effect that the test to be applied is one of reasonable compensation, and that compensation and not penalty affords a measure to be imployed in determining the amount of damages which a party is entitled to by reason of breach of contract. Krause v. Greenfield, 61 Or. 502; Electrical Products Corporation v. Ziegler Stores, 141 Or. 117, and numerous other authorities cited in the briefs of the parties.

The law is also well settled that where the parties have stipulated as to the amount of damages in the event of the breach of a contract, such an agreement will be enforced where it would be difficult or impracticable or impossible to determine the amount of actual damage, except where it clearly appears that the amount specified grossly exceeds the actual damages so as to be unconscionable or all out of proportion to the actual loss. The courts further hold that the damages must not be grossly excessive, unjust, oppressive, unreasonable or disproportionate to the loss so as to shock the conscience of the Court, and that the stipulated sum will not be allowed as liquidated damages

unless it may fairly be allowed as compensation for the breach. An the Oregon authorities also hold that this generally presents a mixed question of law and fact to be presented to the Court for determination.

We have, however, another situation involved here, which defendant claims has been definitely settled by the Oregon court. This involves the matter of one or more covenants in a contract, damages for the breach of which are fixed by the contract in the same amount, regardless of the importance of the covenants and regardless of whether or not damages could be easily ascertainable for the breach. Wilhelm v. Eaves, 21 Or. 194; Alvord v. Banfield, 85 Or. 49; Electrical Products Corp. v. Ziegler Stores, 141 Or. 117. We find in the Electrical Products case the following language which announces this doctrine (p. 123):

> "When a contract, specifying one certain sum as liquidated damages, containing various stipulations of different degrees of importance, and the damages from the breach of some of which would be easily ascertainable, though the remainder might belong to that class which justifies such arrangement as to damages, and by the terms of the contract such sum would be payable equally on the failure to perform the least as of that to perform the most important, or equally on the failure to perform the one, the damage from the violation of which would be easily ascertainable, as to that from the breach of which the loss would be difficult of ascertainment, the stipulated sum will be regarded as a penalty, and not liquidated damages, though the language of the parties be the strongest which could be employed to evince a contrary intent." • • •

This point was also urged by defendant in its demurrer and the Court in overruling the demurrer held that a mixed question of law and fact was presented to the Court and that it did not appear on the face of the complaint that the sum demanded amounted to a penalty *so as to defeat plaintiffs'*

cause of action. In order to clarify the meaning, regarding which there seems to be some doubt, the Court followed the instructions given in the Electrical Products Corporation case, in which the Court held that although the amount set forth in that case constituted a penalty, the Court should proceed to take testimony in order to determine the actual damage. This was done in the trial of the instant case.

Defendant urges that there are five provisions of the contract, for the breach of any one of which defendant would be held in the sum of $4500.00, and that the damages resulting from some of these breaches are inconsequential and readily ascertainable and therefore the amount stipulated as liquidated damages cannot under the law be allowed to the plaintiffs. Counsel designates these provisions as follows:

1. By shipping non-Conference without offering the goods to a Conference member (Art. 1).
2. By shipping non-Conference after failure to secure space from a Conference member but prior to the expiration of 48 hours after notifying the Conference secretary of such failure (Art. 2).
3. By shipping non-Conference by evasion or subterfuge (Art. 3, first sentence).
4. By shipping a non-signatory's goods in his own name (Art. 3, second sentence).
5. By refusing to furnish information on any shipment made (Art. 9, second paragraph).

An analysis of these various provisions indicates that they are all for failure to make shipments pursuant to the terms and provisions of the contract. Breach designated as No. 1 by the defendant could and would constitute a substantial breach of contract, as would also breach designated as No. 3, which contains the charge made in the present complaint.

Breach designated as No. 2 may or may not amount to a substantial breach. The contract requires the shipper to notify the Conference secretary of inability to secure space on one of the Conference carriers and to allow 48 hours to elapse in order to permit the secretary to confirm that space is not available before shipping on another carrier. This

may or may not amount to a consequential breach, depending upon the situation as it exists. If after notice the secretary is unable to obtain a carrier for the shipper's goods, no damage could possibly accrue to the plaintiffs if shipped by another prior to the expiration of 48 hours, and if that situation were to develop, it would result in nominal damages only. However, if a ship was available or could be made available, substantial damages could accrue. This breach could result in a consequential or inconsequential breach, depending upon the situation actually existing at the time.

Breach designated as No. 4 could in no event result in damages in excess of $750.00, the difference between the contract and non-contract rate ($3.00 per ton) and the damages for a breach of this sort are easily ascertainable, for the shipper in that instance would simply be paying the lower rate, instead of the non-contract rate provided by the tariff, and the damages would not exceed the difference in rate.

The Court will not comment upon breach designated No. 5 for the reason that there is a question in the Court's mind as to whether this standing by itself would or would not constitute a breach of contract. It is not set up in the agreement as a covenant for the breach of which damages could be recovered.

It therefore appears from the Court's analysis that the damages for the breach of some of the covenants are readily ascertainable or inconsequential, and for some would perhaps be consequential and difficult or impossible of ascertainment. However, our Court in the Electrical Products case has announced the law in this forum and held, as heretofore indicated, that where some of the damages are readily ascertainable and where some are inconsequential, and where some would be difficult of ascertainment, the stipulated sum will be regarded as a penalty, and not liquidated damages, "though the language of the parties be the strongest which could be employed to evince a contrary agreement."

From this the Court has come to the conclusion that the amount specified in the contract as liquidated damages would constitute a penalty and could not be recovered as

liquidated damages for breach of the contract involved in this case. The Court felt that it clarified this position at the time of its ruling on the demurrer and particularly called attention to the Electrical Products case and suggested, as there suggested, that the case should be heard by the Court in order to determine damages and would not be disposed of by demurrer.

Plaintiffs' position, from the testimony offered by witnesses Tait and Krull, was that the damages would be difficult or impracticable or impossible to determine, due to the various factors involved. As outlined by the testimony, neither of the witnesses had any experience in cost accounting, nor did either witness know what relationship the costs bore to the revenue obtained by the freight charges. There was some testimony as to the daily costs involved regarding some of the vessels, but this testimony was given in the nature of hearsay and was not apportioned to the amount of freight involved in the present case. There was also testimony regarding some stevedoring charges involving loading 250 tons of flour at Astoria and unloading at Manila. However, other costs were not gone into and the Court was not advised regarding these other costs, and the Court would therefore be in a position where it would be obliged to speculate as to the amount of compensatory damages that should be allowed for breach of the contract. There was also testimony to the effect that there were Conference ships available which could have picked up the cargo in question, but nowhere was there any testimony, to the Court's recollection, that would cover the cost, including overhead, to handle a cargo of this size by any available vessel.

The Court is not unmindful of the fact that counsel for plaintiffs disagrees with the Court's theory and that he relied upon the proposition that it was difficult or impracticable to determine damages, and that since the contract provided for liquidated damages, plaintiff should recover this sum. However, in view of the Electrical Products Company case and the case of Wilhelm v. Eaves, supra, and Dairy Co-op. Association v. Brandes Creamery, 147 Or. 488, the Court feels that the evidence should have determined

with reasonable certainty the damages sustained, so that the Court could make a reasonable determination of damages. The Court cannot determine this without indulging in speculation.

It was stipulated that the basic Conference agreement was regularly filed and approved by the proper regulatory body. It was also stipulated that the contract sued on, that is, the contract between the plaintiffs and the defendant, was also filed with the proper regulatory body, and that this Board neither approves nor disapproves this contract. Defendant urges that the Federal Maritime Board is by law required to approve this contract, pursuant to the provisions of Sec. 15 of the Shipping Act, and that the language of the act itself makes the contract unlawful unless it has been expressly approved.

Defendant cites the case of Ellamar Mining Co. v. Alaska SS. Co., 5 Fed. 2nd 890, and the case of U. S. v. American Union Transport, 327 U. S. 437, as cases upholding its contention, particularly that a shipper is a person subject to the provisions of this act. Plaintiffs in their answering brief cite the cases of Prince Line v. American Paper Exports, 55 Fed. 2nd 1053, and the case of U. S. v. Far East Conference, 94 Fed. Supp. 900, as holding to the contrary, and quote the language of Judge Learned Hand in the Prince case that "It is doubtful if a shipper is subject to the act at all." This Court feels that it is not necessary to reconcile the divergent views expressed by the Federal courts in order to determine the merits of this controversy and the Court will not attempt to do so.

Defendant also urges that the contract violates the provisions of the Shipping Act in that different rates are set up for contract and non-contract shippers for the same commodities and cites as its authority Swayne and Hoyt v. U. S., 300 U. S. 297, and Isbrandtsen Co. v. United States, et al., Civ. 47-479, decided by the U. S. District Court for the Southern District of New York, March 20, 1951. These cases hold that the differential rates on commodities transported under contract and on the same commodities for non-contract shippers are prima facie discriminatory, since the two rates are charged for identical services and facilities

and, therefore, in violation of the provisions of Sec. 16 of the Shipping Act. This Court will follow the ruling announced by these decisions and comes to the conclusion that, since the rates are prima facie discriminatory, a case has been established of prima facie illegality of the contract. Since the Court arrives at this conclusion, the Court cannot reconcile itself to the view that the defendant must appear before the regulatory Board (the Federal Maritime Board) in order to have a contract prima facie illegal declared so prior to urging this defense.

Defendant also urges that the contract sued on is unjustly discriminatory between shippers and ports and unjustly prejudicial to United States exporters, in violation of the provisions of Sec. 17 of the Shipping Act. No authorities have been called to the Court's attention construing this section, but a reading of this section lends support to this claim. This particular section reads as follows: "No common carrier by water in foreign commerce shall demand, charge or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors." It will be noted that flour is not a contract commodity in Canada but is a contract commodity when shipped from the United States. It will also be noted that a contract shipper may ship flour from Canada at a lower rate by any vessel, while the same shipper is obliged to pay the contract rate if shipping this commodity from a United States port.

The Court holds that this situation makes a prima facie showing of unjust discrimination and is unjustly prejudicial to exporters of the United States as compared with foreign competitors.

For the reasons indicated herein judgment may be entered for the defendant. Counsel will prepare the necessary findings of fact and judgment.

Dated, July 16, 1951.

(S.) MARTIN W. HAWKINS,
Judge.

APPENDIX B

Section 14, Shipping Act, 1916, as amended, 39 Stat. 733, 46 U. S. C. sec. 812:

SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the pupose of excluding, peventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discrim-

inate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

Section 14a, Shipping Act, 1916, as amended, 39 Stat. 733, as amended, 46 U. S. C. sec. 813:

SEC. 14a. The Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 14, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves, in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is citizen of the United States and has applied for such admission.

If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directy or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Section 15, Shipping Act, 1916, as amended, 39 Stat. 733, 46 U. S. C. sec. 814.

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair, as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to

carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 16, Shipping Act, 1916, as amended, 39 Stat. 734, 46 U. S. C. sec. 815:

SEC. 16. That is shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or de-

scription of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Section 17, Shipping Act, 1916, as amended, 39 Stat. 734, 46 U. S. C. sec. 816:

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Section 22, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 821:

SEC. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued may direct the payment on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and except as to orders for the payment of money with the same powers, investigate any violation of this Act.

Section 23, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 822:

SEC. 23. Orders of the board relating to any violation of this Act shall be made only after full hearing and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, as amended or supplemented shall continue in force until its further order or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Section 24, Shipping Act, 1916, as amended, 39 Stat 736, 46 U. S. C. sec. 823:

SEC. 24. That the board shall enter of record a written report of every investigation made under this Act in

which a hearing has been held stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof.

Section 25, Shipping Act, 1916, as amended, 39 Stat. 763, 46 U. S. C. sec. 824:

SEC. 25. That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order.

FILED
NOV 13 1954
HAROLD B. WILLEY, Clerk

In

The Supreme Court

of the United States

OCTOBER TERM, 1954

No. 410

PACIFIC WESTBOUND CONFERENCE, et al.,

Petitioners,

vs.

LEVAL & CO., INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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INDEX

Page

STATEMENT 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

QUESTION PRESENTED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 3

Argument 3

Introduction 3

I. THE OREGON SUPREME COURT CORRECTLY HELD THAT THE SHIPPING ACT REQUIRES PRIOR BOARD APPROVAL OF THE EXCLUSIVE PATRONAGE SYSTEM 5

(1) Section 15 Expressly Requires Prior Sanction..... 5

(2) The Board Did Not Authorize the System in Approving the Organic Agreement in 1923..... 6

(3) Petitioners Distort the Ruling Below 8

II. THE DECISION BELOW IS NEITHER NOVEL NOR TROUBLESOME 10

(1) The Ruling Is Not Unprecedented 10

(2) Board Practice In This Field Has Been Inconsistent 11

(3) There Is No Conflict 12

(4) The Dual-Rate System Is For The Board..... 12

CONCLUSION 13

APPENDIX 14

CITATIONS

Page

Agreement Establishing Air Cargo, Inc., 5 CAB 468 8

American Surety Co. v. *Bethlehem Nat. Bank*, 314 U.S. 314 11

Civil Aeronautics Board v. *Summerfield*, 74 S. Ct. 350 10

Contract Rates-North Atlantic Continental Freight Conference, 4 F.M.B. 98 9

Contract Rates-North Atlantic Freight Conference, et al., 4 F.M.B. 355 ..... 9, 12

Contract Routing Restrictions, 2 U.S.M.C. 220 12

Eden Mining Co. v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 ..... 11, 12

Ex Parte 4, Sec. 15 Inquiry, 1 U.S.S.B. 121 3

Far East Conference v. *United States*, 342 U.S. 570 12

IATA Traffic Conference Resolution, 10 CAB 783 7

Intercoastal Investigation, 1 U.S.S.B. 400 12

Isbrandtsen Co. v. *United States*, 96 F. Supp. 883 Aff'd. 342 U. S. 950 ..... 4, 7, 11

Isbrandtsen Co. v. *United States*, 81 F. Supp. 344, App. dismissed 336 U. S. 941 ..... 6, 10

Isbrandtsen Co. v. *United States*, 211 F. (2d) 51, cert. den. 347 U. S. 990 11

Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139 11

CITATIONS—Continued

Page

Kosbland v. *Helvering*, 298 U. S. 441 13

Rawleigh v. *Steamvart*, 1 U.S.S.B. 285 11

Resolution of North Atlantic Traffic Conference, 6 CAB 845 7

River Plate & Brazil Confs., et al., v. *Pressed Steel Car Co., Inc.*, (Civ. 88-211, S.D. N.Y., 9-17-54) 11

United States v. *Borden Co.*, 308 U. S. 188 6

United States v. *Sullivan*, 332 U. S. 689 6

United States Navigation Co. v. *Cunard S.S. Co.*, 50 F. 2d 83, aff'd. 284 U. S. 474 ..... 11, 12, 13

STATUTES

Civil Aeronautics Act, Sec. 412(b) 8

Review Act, Hobbs Act
Sec. 1032, 5 U.S.C. 2, 13, 14

Shipping Act, 1916, 46 U.S.C. 801 2

Sec. 15, 46 U.S.C. 814 ..... 2, 4, 5, 9

Sec. 22, 46 U.S.C. 821 13

Sec. 31, 46 U.S.C. 830 13

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LEVAL & CO., INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

STATEMENT

The following brief is submitted by respondent, Leval & Co., Inc., in opposition to the Petition for Writ of Certiorari heretofore filed by Petitioners, Pacific Westbound Conference, et al.

OPINIONS BELOW

The opinions below are printed in Appendix A to the Petition.

JURISDICTIONAL STATEMENT

Respondent believes that Petitioners' statement on jurisdiction (Pet. 2) is correct.

QUESTION PRESENTED

Petitioners state the question presented as follows:

> "Whether Section 15 of the Shipping Act, 1916 requires the Federal Maritime Board to give prior separate approval to the use of contract-non-contract rates by common carriers in foreign trade whose conference agreements, theretofore approved by the Board, provide for and contemplate the collective fixing of lawful rates." (Pet. 2)

We believe the question is more accurately stated as follows:

> Is a so-called "exclusive patronage" or "dual-rate" agreement between a shipper and a group of carriers subject to the Shipping Act, 1916, giving the former a $3.00 per ton freight differential below regularly published tariff rates valid under Section 15 of the Act in the absence of approval by the Federal Maritime Board where the conference agreement of the carriers approved by the Federal Maritime Board does not provide for exclusive patronage contracts or dual-rates?

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, as amended, 39 Stat. 728, 46 U.S.C. 801, et seq., specifically Section 15 of that Act, 46 U.S.C. Sec. 814, and 5 U.S.C.A., Sec. 1032 of the Review Act of 1950, colloquially known as the Hobbs Act. The Shipping Act provisions are printed in Appendix B to the Petition and Sec. 1032 of the Hobbs Act is the Appendix hereto.

STATEMENT OF THE CASE

Respondent does not substantially disagree with Petitioners' Statement Of The Case except for its implication (Pet. 2-3) that the Federal Maritime Board's approval of Petitioners' basic conference agreement which concededly gave it a rate-making function also gave Petitioners power to enter into the dual-rate contract involved here. The difference between these two powers is the essence of the difference between Petitioners' view as stated in their Petition and our own.

REASONS FOR DENYING THE WRIT

ARGUMENT

INTRODUCTION

Most of Petitioners' 11-page argument urging that the Writ be granted is devoted to a meticulous destruction of a straw man. The straw man is the contention that, if the Federal Maritime Board (hereinafter "Board") be required to approve dual-rate systems as a condition of their legality, the Board would be administratively overwhelmed. It would be overwhelmed, contend Petitioners, because if the Board had to approve dual-rate systems, it would also have to approve each separate rate filed by Petitioners (Pet. 9). For this proposition but one case, *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, 124-5, is cited.

The short answer to the straw man is that *Ex Parte 4, Section 15 Inquiry* does not mention dual rates. The longer answer is that that case does no more than to give Petitioners a rate-making function, meaning that rates are effective when filed just as are railroad and motor carrier rates under the Interstate Commerce Act and just as railroad rates were at common law. That is to say, rates are effective when filed and *until* successfully attacked as unreasonable, or otherwise illegal.

This is, however, not a rate case, as the court below made clear and as every other court which has considered the problem of dual-rates has made clear. To require (as the lower court did and as other courts have done) that dual-rate systems be approved as a condition of legality is *not* the same thing as requiring the Board to approve each separate rate filed.

As we have said, this is not a rate case. The Opinion below (Pet. 26-27) makes abundantly clear that there is involved only the Oregon Supreme Court's ruling that the contract/non-contract *system* (emphasis supplied throughout) must be approved by the Board as a condition of legality. Indeed, that system incorporates no specific rates at all but only an arbitrary differential of $3.00 per ton (Pet. 34) that is applied between whatever particular rates the Conference has set. Thus the case does not involve, as Petitioners claim (Pet. 8, last para.), the validity or justification of particular rates on particular commodities set by the Conference in pursuance of their rate-making authority under the basic conference agreement.

The question is *not* whether the Federal Maritime Board must accord prior approval to a proposal by the Pacific Westbound Conference to charge $50 instead of $45 per ton for tuna fish. Rather, this case concerns not a *standard* of rate-making that applies a single rate *uniformly* to all shippers receiving the same transportation service, but a standard that applies dual rates *non-uniformly* to shippers receiving the same transportation service. The issue, therefore, is whether, consistently with Section 15 of the Shipping Act, the Conference can enforce *without prior Board approval*, a *system*, a different principle of rate making, which the Federal Maritime Board itself has "frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades." *Isbrandtsen* v. *United States*, 96 F. Supp. 883, 888 (S.D. N.Y. 1951), aff'd. 342 U. S. 950. Applying the language of Section 15 of the Shipping Act (Sec. 814 of

Title 46 U.S.C.), the Oregon Supreme Court concluded that an exclusive patronage system cannot be enforced without prior Board sanction (Pet. 26).

Petitioners urge that this narrow ruling is really a sweeping decision that "each rate filed" and "each action taken by the conferences" require prior Board authorization (Pet. 9). As we shall show, there is not the slightest warrant for so construing the carefully drafted opinion of the court below. The decision of the Oregon Supreme Court is clearly correct; it involves merely the straightforward application of an unambiguous statutory provision; it is not unprecedented; and it presents no conflict with decisions of this Court or with the decisions in other courts. Certiorari is, accordingly, not warranted in this case.

I. THE OREGON SUPREME COURT CORRECTLY HELD THAT THE SHIPPING ACT REQUIRES PRIOR BOARD APPROVAL OF THE EXCLUSIVE PATRONAGE SYSTEM.

(1) *Section 15 Expressly Requires Prior Sanction.* The most striking thing about the Conference petition is the cavalier way it brushes aside the pertinent statutory provision, even though it does quote it in full (Pet. 7-8). Section 15 of the Shipping Act, 46 U.S.C. Sec. 814, quoted by Petitioners, requires "every common carrier" to file with the Board a copy of "every agreement" with another carrier or person (1) "fixing or regulating transportation rates or fares", or (2) "giving or receiving special rates, accommodations, or other special privileges or advantages"; or (3) "controlling, regulating, preventing, or destroying competition". Agreements are comprehensively defined to include "understandings, conferences and arrangements." Section 15 further provides:

> "*All agreements,* modifications, or cancellations made after the organization of the Board shall be lawful *only when and as long as approved by the Board,* and *before*

approval or after disapproval, it shall be unlawful to carry out in whole or in part, directly or indirectly any such agreement, modification, or cancellation."

It follows that an agreement establishing an exclusive patronage system—which relates to the regulation of rates and which gives special rates or advantages—is lawful "only when * * * approved." The Oregon Supreme Court correctly so held.[1]

(2) *The Board Did Not Authorize the System in Approving the Organic Agreement in 1923.* Petitioners maintain that "basic conference agreements require[d] approval, but additional approval was not required for particular rates . . ." (Pet. 9). Petitioners also rely upon the provision in the "basic enabling agreement authorizing the use of such rates" (Pet. 10). In other words, petitioners contend that when the Board approved the constitutive conference agreement in 1923 (Pet. 13), it thereby sanctioned the use of a particular exclusive patronage system. However, as the Oregon Supreme Court pointed out (Pet. 27), the "organic agreement" contains no provision authorizing an exclusive patronage system.[2] Even though the Oregon Supreme Court was aware that the basic agreement permitted rate making (Pet. 26), it nevertheless held the dual-rate provision illegal without approval.

There is yet another vice in the contention that approval of the basic conference agreement constituted approval of an exclusive patronage system, particularly where, as here, the basic

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[1] The canon that plain meaning should be given effect, *United States* v. *Sullivan*, 332 U. S. 689, 693, is reinforced in this case because agreements approved by the Board pursuant to Section 15 are made exempt by that section from the antitrust laws, and such exemptions are strictly construed. *United States* v. *Borden Co.*, 308 U. S. 188, 201.

[2] Compare the North Atlantic Continental Freight Conference agreement in *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), appeal dismissed 336 U. S. 941, which expressly provided that "The conference may provide specific contract and non-contract rates * * *." 81 F. Supp. at 545.

agreement did not mention exclusive patronage. Such a system is invalid if the spread between the contract and non-contract rates is arbitrary.[3] It can scarcely be maintained that the Board approved a $3.00 per ton spread in a 1946 agreement with Respondent (Pet. 3) when it sanctioned the basic agreement in 1923, for in 1923 no one knew when, if ever, the Conference would undertake to institute a contract system or what, if any, spread between the dual rates it would undertake to employ.

Certainly the Board itself would hardly argue that when it approves a basic conference agreement it sanctions whatever practice the Conference may thereafter devise, however discriminatory or arbitrary that practice may be. Such a view would constitute the height of administrative irresponsibility—to be contrasted with the view of Commissioner Aitchison of the Interstate Commerce Commission that an administrative agency would "create an injustice * * * by omitting to inform itself and by acting ignorantly when intelligent action is possible." *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 892 (S.D. N.Y. 1951). And as the Civil Aeronautics Board has stated in construing analogous statutory provisions which confer an exemption from the antitrust laws to inter-carrier agreements approved by the CAB:[4]

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[3] "Dual rate provisions which authorize arbitrary differentials are obviously not reasonable" and "provisions which permit such rates are invalid". *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S.D. N.Y. 1951), aff'd 342 U.S. 950.

[4] Section 412 of the Civil Aeronautics Act, 49 U.S.C. Sec. 492, requires every carrier to file with the Board certain specified agreements. "The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter." Agreements so approved are exempt from the antitrust laws. 49 U.S.C. Sec. 494. Construing these sections, the Board has accorded prior approval to agreements covering rates, forms of tickets, terms of carriage, and the like. See *Resolution of North Atlantic Traffic Conference*, 6 CAB 845 (1946); *IATA Traffic Conference Resolution*, 10 CAB 783 (1945).

"Section 412(b) of the Civil Aeronautics Act requires that we shall approve specific agreements to accomplish such purposes only *after careful scrutiny to determine that the provisions of any such arrangement adequately protect the public interest involved.*" Agreement Establishing Air Cargo, Inc., 5 CAB 468, 469 (1948).

(3) *Petitioners Distort the Ruling Below.* Petitioners seek to escape the "clear language" of Section 15 with a parade of imaginary horribles. Thus, they argue that the "clear language of the Section [15], taking its words in their literal meaning, requires approval by the Board of every routine conference activity including day-to-day rate changes however minor in nature" (Pet. 8). They complain that the decision below will "place an intolerable administrative burden upon the Board (Pet. 9). The Board will be required, Petitioners state, to "pass upon the thousands of rate proposals it receives each month" (*Id.* at 6).

These extravagant claims set up a strawman totally unwarranted by anything in the opinion of the court below. That court pointedly emphasized that "an agreement of dual rates as set forth in the contract sued on is subject to the control of the United States Maritime Commission" [Board] (Pet. 26). In short, the court below concluded *only* that the Shipping Act compels prior approval of an agreement among carriers to employ the exclusive patronage system and not of the specific rates promulgated thereafter pursuant to the agreement.

Petitioners themselves expose the fanciful character of the "intolerable burden" claim. They admit that there are only 105 conferences engaged in foreign commerce, and of these 60 employ the exclusive patronage system (Pet. 9, 13). This is a far cry from the "thousands of rates" petitioners conjure up (Pet. 9). Indeed, in a calmer vein, the Conference itself recognizes that the Board has power to order a conference to desist from instituting the dual-rate system (Pet. 15). For this prop-

osition petitioners correctly cite *Contract Rates-North Atlantic Continental Freight Conference*, 4 F.M.B. 98 (1952). Petitioners, however, leave out the *reason* the Board thought it had this authority. Here it is:

> ". . . the possibility of an arbitrary spread in the dual rates now proposed * * * is of such importance that the status quo of the Conference carriers with respect to dual rates should not be changed pending the completion of the investigation into this matter which we have instituted. For the carriers to put the dual rate system into effect prior to the completion of our inquiry would, in our judgment, operate to the detriment of the commerce of the United States." *Contract Rates, North Atlantic Continental Freight Conference*, Docket 724, 4 F.M.B. 98, 105-6 (1952).

After this decision the Board went forward and held in *Contract Rates-North Atlantic Continental Freight Conference, et al.*, 4 F.M.B. 355, that a particular dual-rate system was valid and approved it. At p. 368 of 4 F.M.B. the Board said:

> "Congress thus by section 15 of the Act authorized ocean carriers to combine their efforts and regulate their rates, and the carriers were given exemption from the penalties of the antitrust laws *if their agreements met with our approval*. The control thus given to us over conference carriers in foreign trade is an extension of a well understood domestic transportation policy, which, through the laws passed over the years since the original Interstate Commerce Act of 1887, has replaced cutthroat competition with regulation, securing stability of rates and dependability of service."

These two *Contract Rate* opinions make it clear that the Board does have power to approve or disapprove dual rate systems. Accordingly, petitioners should apply to the Board for approval instead of seeking to invoke this Court's certiorari jurisdiction in an attempt to rewrite Section 15.

In substance, petitioners really are seeking to rewrite the statute. Even if tenable, the arguments that prior approval is "impracticable" have been advanced in the wrong forum. Congress has explicitly provided that such agreements shall be "lawful only when and as long as approved by the Board" and that "before approval * * * it shall be unlawful to carry out * * * any such agreement." Whether agreements shall be lawful absent prior approval is a "matter of policy for Congress to decide." *Civil Aeronautics Board v. Summerfield*, 74 S. Ct. 350, 354.

II. THE DECISION BELOW IS NEITHER NOVEL NOR TROUBLESOME.

(1) *The Ruling Is Not Unprecedented.* Petitioners maintain that the decision below is "in diametric opposition to a well established and long standing construction" of Section 15 by the Board (Pet. 5-6). In fact, the Board has frequently changed its mind. Petitioners add that "the issue is both novel and troublesome" (Pet. 6). It is neither.

The requirement of prior Board approval or disapproval is established by *Isbrandtsen* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), appeal dismissed, 336 U.S. 941. In that case, Isbrandtsen brought suit to "enjoin and set aside as much of the orders of the United States Maritime Commission approving conference agreements as authorized imposition by steamship carriers of contract and non-contract rates" (81 F. Supp. at 544). A three-judge statutory court declared in awarding the injunction:

> "We are all in agreement that a temporary injunction should issue to maintain the status quo pending further proceedings ['before the Commission'] to adjudicate the legality of the Conference agreements and the action contemplated pursuant thereto.
>
> ". . . We should not at this stage pass on the validity of the agreements *before the Commission* in accordance with its established procedure, *has had an opportunity to pass thereon in an adversary proceeding.*" (81 F. Supp. 546).

This was a square holding that an exclusive patronage system could not be effectuated prior to agency approval and judicial review of such agency action. This Court dismissed the appeal from such ruling. 336 U.S. 941.

Petitioners have also overlooked *United States Navigation Co.* v. *Cunard S.S. Co.*, 50 F. 2d 83 (C.A. 2, 1931), aff'd. 284 U.S. 474, where the Court of Appeals (per A. Hand, J.) said with reference to an identical dual rate system: "As the agreement set forth in the amended bill is alleged not to have been approved by the Board, it is ex vi termini unlawful" (50 F. 2d at 88). The Court added that "the failure to secure the approval of such an agreement" is "forbidden by the Shipping Act" and that the "Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has, may order it filed and require the parties to cease from acting under it *unless and until its approval*" (*Ibid.* at 89). Petitioners have further conveniently by-passed *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, where this Court, citing Section 15, stated: "[T]he act requires that if any contract for a change of those rates is made the new rate may be charged only *after* the Board has approved the agreement" (300 U.S. at 146). Lately the ruling below and *Isbrandtsen Co.* v. *U. S.*, 211 F. (2d) 51 (1954), cert. den., 347 U.S. 990, squarely held that dual rates systems are illegal unless and until approved. So did *River Plate and Brazil Confs., et al.* v. *Pressed Steel Car Co., Inc.*, (Civ. 88-211, S.D. N.Y., 9-17-54), which cited both cases in support of the ruling.

(2) *Board Practice In This Field Has Been Inconsistent.* The decisions of the Board concerning the dual-rate system "have lacked uniformity and consistency; and, in such circumstances, administrative interpretations have little weight." *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 890 (S.D. N.Y. 1951), aff'd. 342 U.S. 950; see *American Surety Co.* v. *Bethlehem Nat. Bank*, 314 U.S. 314, 319. In *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922), the Shipping Board held that ex-

clusive patronage systems were "unjustly discriminatory" and therefore unlawful. Eleven years later, in *Rawleigh* v. *Stoomvaart*, 1 U.S.S.B. 285, 290 (1933), the Board indicated that the *Eden* rule applied only to a single carrier and not to a conference agreement. In *Intercoastal Investigation*, 1 U.S.S.B. 400, 452 (1935), the Shipping Board Bureau rejected this distinction. Thereafter, in *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226-227 (1939), the Maritime Commission held that the *Eden* case applied to a conference agreement. More recently, the Board has taken the position that "under some circumstances and with some percentage differentials a dual rate system may be valid." *Contract Rates: North Atlantic Continental Freight Conference*, 4 F.M.B. 355 (Jan. 6, 1954). Finally even if the administrative practice had been as clear and consistent as petitioners claim it has been, it nevertheless must yield to "clear language" in a Congressional enactment. *Koshland* v. *Helvering*, 298 U.S. 441, 447.

(3) *There Is No Conflict.* Petitioners apparently argue that there is a conflict between the ruling below and the decisions of this Court in *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, and *Far East Conference* v. *United States*, 342 U.S. 570 (Pet. 11-12). The *Cunard* and *Far East* cases decided that a complaint challenging the validity of a dual-rate system under the antitrust laws must be presented to the Board before judicial relief is invoked. We don't see the application of these cases in this Court. Petitioners sued respondent upon a dual-rate contract. Respondent defended on the ground (among others) that such contract was illegal because not approved (Pet. 4). Petitioners contended below that such defense should have been taken by respondents to the Board (Pet. 37). The trial court ruled against petitioners on the point. Since petitioners do not renew the point here, the *Cunard* and *Far East* cases appear to have no bearing on any issue before this Court.

(4) *The Dual-Rate System Is For The Board.* If a Conference files an application with the Board seeking approval of its

exclusive patronage system, the Board is required under Section 15 of the Shipping Act to approve or disapprove the application, and its decisions are reviewable under the Hobbs Act, 5 U.S.C.A. Sec. 1032. On the other hand, as this Court has explained, "if there be a failure to file an agreement as required by Section 15, the Board, as in the case of other violations of the Act, is fully authorized by Section 22, *supra*, (46 U.S.C.A. Sec. 821), to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under Section 31 (46 U.S.C.A. Sec. 830) [since superseded by the review provisions of the Hobbs Act, *supra*] for the first time, open to a judicial proceeding to enforce, suspend, or set them aside, in accordance generally with the rules and limitations announced by this Court." *United States Navigation Co. v. Cunard S.S. Co.*, 284 U. S. 474, 484.

CONCLUSION

For the above reasons the Writ should not issue.

Respectfully submitted,

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APPENDIX

5 U.S.C.A. Sec. 1032. Jurisdiction of courts of appeals.

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 210(e), 217a, and 499g(a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title. Dec. 29, 1950, c. 1189, Sec. 2, 64 Stat. 1129.